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IN THE
Supreme Court of the United States

OCTOBER TERM 1967

No. 80

FEDERAL POWER COMMISSION,

Petitioner,

v.

STANDARD OIL COMPANY OF TEXAS,
A DIVISION OF CHEVRON OIL COMPANY, *et al.,*

Respondents.

No. 97

THE UNITED GAS IMPROVEMENT COMPANY,

Petitioner,

v.

SUNRAY DX OIL COMPANY,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

**BRIEF IN OPPOSITION FOR RESPONDENTS SUNRAY DX
OIL COMPANY, TEXACO INC., SUN OIL COMPANY, SOHIO
PETROLEUM COMPANY, EDWIN L. COX, HUMBLE OIL &
REFINING COMPANY, LAMAR HUNT, GEORGE H. COATES,
PATCHIN-WILMOTH INDUSTRIES, INC. AND CLARK FUEL
PRODUCING COMPANY**

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Tenth Circuit setting aside the Commission's Opinion Nos. 501 and 501-A directing refunds and the Tenth Circuit's opinion on rehearing are reported at 376 F. 2d 578, 580, and are printed as App. A, *infra.* The opinions and orders of the Commission directing refunds are not yet reported.

They are printed in App. C to the Commission's pending petition in *Federal Power Commission v. Sunray DX Oil Co., et al.*, No. 60 (O.T. 1967).

JURISDICTION

The judgments of the court below were entered on March 27, 1967 (No. 80, App. B, pp. 14-21). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

The "Question Presented" by No. 80 (O.T. 1967) and Question No. 1 presented by No. 97 (O.T. 1967) seek review of the Tenth Circuit's determination in the case below that the Commission lacked the power, in the circumstances presented, to require retroactively the refund of amounts collected pursuant to temporary certificates which contained no refund obligations. The court below has previously determined that the Commission lacked such refund power in the identical circumstances when it reviewed the Commission's Opinion Nos. 422 and 422-A¹ in *Sunray DX Oil Company, et al. v. Federal Power Commission*, 370 F.2d 181 (10th Cir. 1966). Petitions for writs of certiorari seeking review of that question have been filed by these same Petitioners in the *Sunray* litigation (Nos. 60 and 61, O.T. 1967). Respondents have filed answers in opposition to those petitions. This question, presented here and in *Sunray* is:

May the Commission retroactively order refunds of amounts collected under lawfully issued temporary certificates when, pursuant to legal precedent and its established policies, the Commission determined both

¹ *Amerada Petroleum Corporation, et al.*, Opinion Nos. 422 and 422-A, 31 FPC 623 and 1315 (1964).

at the time of issuance of such certificates and upon subsequent reconsideration that no refund liabilities should be imposed?

The additional question purportedly reserved for argument by footnote reservation in No. 80 (p. 4, fn. 1) and raised by Question No. 2 in No. 97 concerns the reasonableness of the Commission's *exercise* of the disputed refund power in its Opinion Nos. 501 and 501-A. In its decision below, the Tenth Circuit did not reach this question in view of its determination in *Sunray* that the Commission lacked a retroactive refund power in the circumstances. The Tenth Circuit made clear, however, that if its disposition of the refund power question were ultimately held to be in error, it is ready to consider the many complex questions, both equitable and legal in nature, which have been raised below concerning the propriety of the Commission's exercise of such power.

The issues encompassed in the question of the Commission's exercise of an asserted refund power were not briefed, argued, reviewed or decided by the court below. Petitioners' extraordinary request that this Court review in the first instance the multi-issue question of whether the Commission reasonably exercised the disputed power would impose an unnecessary burden upon this Court² and would

² It should be noted that eleven separate petitions to review were filed with the court below. Uniformly, these petitions questioned not only the Commission's legal authority to order refunds, but also raised numerous and complex subsidiary questions concerning the manner in which the Commission had exercised its claimed authority. These subsidiary questions were not briefed or argued before the court below because of its summary disposition of the primary question. In the event that the Court deems the second question to be properly raised at this time, then the numerous and complex subsidiary questions enumerated in the various petitions filed with the court below must be regarded as encompassed within the question of whether the Commission reasonably exercised the disputed refund power.

disrupt the orderly procedure established by Congress for judicial review of Commission orders under Section 10(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

STATUTE INVOLVED

The pertinent provisions of Section 7 of the Natural Gas Act are set forth in the Commission's petition (No. 80, pp. 2-3). The pertinent portion of Section 19(b) of the Act is as follows:

"Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain the review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254)."

STATEMENT

The basis for decision of the court below is that court's prior decision in *Sunray DX Oil Company, et al. v. Federal Power Commission*, 370 F. 2d 181 (1966). The *Sunray* decision reviewed the Commission's Opinion Nos. 422 and 422-A issuing permanent certificates of public convenience and necessity authorizing sales of natural gas from Texas Railroad Commission District No. 4 by certain independent producers, including Respondents. In those opinions, the

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Commission held that it possessed the power to require refunds of amounts previously collected under lawful temporary certificates, but, deferred the exercise of such asserted authority pending further analysis of the equitable considerations involved. In *Sunray* the court below affirmed the administrative authorization of these sales prospectively at a price of 16 cents per Mcf but held that the Commission lacked the power to require on a retroactive basis the refunding of any amounts collected by Respondents pursuant to lawful temporary certificates previously granted by the Commission.

Shortly before the decision of the court below in *Sunray*, the Commission issued its Opinion Nos. 501 and 501-A by which it imposed specific refund obligations upon Respondents in accordance with its prior holding asserting the power to impose such refunds. In per curiam disposition of Respondents' appeals of Opinion Nos. 501 and 501-A, the court below relied upon its prior determination in *Sunray* on the refund question and set aside those opinions of the Commission. The petitions filed here in Nos. 80 and 97 followed. As a consequence, the question of the Commission's power to impose refunds raised in Nos. 80 and 97 merely duplicates the question already raised by the same Petitioners in Nos. 60 and 61 (O.T. 1967) which are now pending before this Court.³

On the premise, held to be erroneous in *Sunray*, that it possessed the power to impose retroactively a refund requirement in these circumstances, the Commission in its Opinion Nos. 422 and 422-A established a procedure for determining the extent of the refunds. Although Respondents moved the Commission for an evidentiary

³ The third petition (No. 62, O.T. 1967) seeking review of the refund power question in *Sunray* was filed by The Brooklyn Union Gas Company, *et al.* This group has not filed a petition seeking review of the decision below.

hearing on the latter question, this was denied by the Commission. By its Opinion Nos. 501 and 501-A, the Commission purported to accept the many factual allegations made by various Respondents demonstrating why refunds should not be ordered, but nevertheless determined that unspecified equitable considerations required Respondents to make substantial refunds of amounts previously collected under their temporary certificates.

As previously indicated, the court below did not reach the numerous issues raised by Respondents concerning the impropriety of the Commission's exercise of a claimed refund power. However, it made clear that it would reach that question when and if its determination on the refund power question were held to be erroneous. Thus, in its opinion on rehearing, the court below stated:

"* * * We adhere to our view that we are not concerned with the exercise of a non-existent [refund] power. If it should be held on Supreme Court review that we are wrong as to the existence of the power, we are ready to consider then the manner of the exercise of the power" (App. A, *infra*, p. 6a; 376 F. 2d 578 at 581).

This approach was wholly consonant with the position pressed below by the Commission. Prior to the decision below, the Commission moved to sever and summarily decide the refund power question on the basis of the prior *Sunray* decision of the court below.⁴ Essentially, this is what the court below has done.

⁴ In this regard, the Tenth Circuit observed in its decision below: "* * * The Commission represented to us that the issue of power was severable from the issue of the exercise of the power and urged us to make summary disposition of the power issue because the same question was decided by our opinion in No. 7781, *Sunray DX Oil Company v. Federal Power Commission*, 10 Cir., 370 F. 2d 181, which is now pending in the United States Supreme Court on the Commission's petition for certiorari * * *" (App. A, *infra*, p. 5a; 376 F. 2d 578 at 581).

REASONS FOR DENYING THE WRITS

The Question Of The Commission's Refund Power

Petitioners in Nos. 80 and 97 assert no further reasons for an on-the-merits review by this Court of the refund power question than they have previously asserted in their petitions in Nos. 60 and 61, respectively.. This is understandable inasmuch as the Tenth Circuit in its decision below has reiterated its prior decision in *Sunray* on this issue. Respondents, therefore, adopt their answers in opposition on the refund power question filed in Nos. 60, 61 and 62 as their answers here.

However, the Commission does assert three procedural reasons for consolidating its petitions Nos. 60 and 80 for briefing and oral argument. Two of these reasons relate to the refund power question initially raised by it in No. 60. As reason No. 1, the Commission urges that a grant of certiorari in No. 60 and a subsequent reversal therein would leave the judgment below in this case "technically undisturbed" if certiorari is not also granted here (No. 60, p. 7). If this be a problem, it can be readily resolved by deferring action upon the petitions in Nos. 80 and 97 pending the final outcome of Nos. 60 and 61.

This is the identical procedure proposed by the Solicitor General in *Federal Power Commission v. Pan American Petroleum Corporation, et al.*, No. 227, October Term 1967. There, the Commission is also attacking a *Sunray*-based holding by the Tenth Circuit and is requesting that its petition in *Pan American* "be held to abide the final disposition" of its petition in No. 60. Speaking for the Commission, the Solicitor General has recently described the Court's normal practice in a comparable situation as follows:

"* * * The Court's normal practice, where a petition raises the same issue involved in a pending case, is to defer action on the petition until the pending case is decided and then dispose of the petition summarily in conformity with its decision. We see no persuasive reason for departing from this practice in the present case — especially since this may be but the first of several additional petitions raising the *Sunray* issue that may soon be before the Court * * * " (Solicitor General's pending petition in No. 144, O.T. 1967, captioned *F.P.C. v. Public Service Commission of N.Y., et al.*).

As reason No. 2, the Commission suggests that a consolidation of No. 80 and No. 60 "would serve to obviate any possible question as to whether the [refund power] issue is ripe for review" (No. 80, p. 7). The court below gave careful consideration to this issue in its *Sunray* decision, the subject matter of No. 60, and concluded that the refund power issue was reviewable. In No. 60, the Commission has agreed with the Tenth Circuit's conclusion (No. 60, pp. 7-8, fn. 6). Consequently, this reason, an apparent makeweight, should not be seriously entertained.

The Question Of The Commission's Exercise Of The Disputed Refund Power

The second question which Petitioners present, i.e., whether the Commission reasonably exercised the disputed refund power, is premature and should not be entertained by this Court.⁵ That question was not decided below, con-

⁵ The Rules of this Court do not permit the usurpation of this Court's function to determine the questions to be reviewed which the Commission seeks by its attempt to reserve additional questions in the event certiorari is granted. Rule 23(1)(c). Frequently, a grant of certiorari is limited to specific questions. *Irvine v. California*, 347 U.S. 128, 129 (1954). In the event certiorari is granted in Nos. 80 and 97, we urgently request that the Court make clear whether or not it wishes the parties to brief and argue all of the various issues not decided by the court below.

sonant with the Commission's representation that the refund power question was severable from the question of whether it had reasonably exercised that claimed power. Accordingly, the court below summarily decided the threshold question on the basis of its prior *Sunray* decision. In these circumstances, the court below did not reach the second question which the Petitioners now improperly ask this Court to review in the first instance.

Petitioners' third reason for consolidated review rests on a claim of judicial economy. On the contrary, consolidation would impose an unreasonable burden upon this Court and deprive the parties of the appellate review contemplated by the Natural Gas Act.

The Commission erroneously claims that this prematurely raised question " * * * involves no complexities or factual disputes of a kind which would counsel preliminary examination by the lower court * * * " (No. 80, p. 4, n. 1). However, it neglects to advise the Court that both the Commission and courts have uniformly recognized that after the determination of the threshold authority issue, the examination of numerous additional complex factors is required before a determination can be made of whether, how, and to what extent, such authority should be exercised.

The following are only a few examples of the many issues raised below by Respondents, but not passed upon by the court below:

1. Whether the Commission improperly denied Respondents the opportunity to present the following evidence demonstrating that the retroactive imposition of a refund condition on the sales at issue is contrary to the public convenience and necessity:
 - a. The extent to which Respondents relied upon the unconditioned temporary certificates granted by the Commission in determining whether to dedicate their gas in interstate commerce.

- b. The impact upon Respondents of requiring retroactive refunds.
 - c. The effect of the Commission's action upon the producing industry from the standpoint of planning, budgeting and financing future drilling and production activities.
 - d. The extent to which such refunds would actually reach the ultimate consumer.
2. Whether the Commission's conclusion that refunds should be required can be justified in light of its acceptance as fact of the following allegations:
 - a. that the ordering of refunds will have a substantially adverse effect upon the ability of natural gas producers to assure consumers of an adequate supply of natural gas.
 - b. that a substantial portion of the monies ordered to be refunded will never reach the ultimate consumer.
 - c. that the costs of making these sales exceeded the revenues received under the unconditioned temporary certificates.
3. Whether the record supports the Commission's reversal of its prior findings and order of February 5, 1963 holding that it would be contrary to the public convenience and necessity to require retroactive refunds in the circumstances presented.
4. Whether the Commission can properly impose upon Respondents an obligation to pay interest on amounts ordered refunded which were lawfully collected pursuant to valid temporary certificates.

In similar circumstances, this Court has often recognized the advantage to all concerned of a prior disposition by the court below of complex issues of this nature, especially in the case of judicial review of administrative decisions. As

recently as March 13, 1967, this Court in its opinion in *FPC v. United Gas Pipe Line Company, et al.*, U.S., 18 L. ed 2d 18, reaffirmed that it does not consider it appropriate to decide in the first instance an issue "to which the Court of Appeals has not addressed itself" (18 L. ed 2d at 26). In *Federal Communications Commission v. W. J. R., The Goodwill Station, Inc.*, 337 U.S. 265 (1949), after noting that parties have a statutory right to an appeal to a United States Court of Appeals from orders of the FCC, the Court held at 285:

"But since the statute, if it affords respondent a right of appeal, provides that it shall be to the court of appeals, and since that court has not decided the basic issue on the merits, we think the cause should be remanded to the court of appeals for decision of that question, uncomplicated by questions of constitutionality relating to the Commission's procedure."

In *Civil Aeronautics Board v. American Transport*, 344 U.S. 4 (1952), the Court held:

"This court does not normally review orders of administrative agencies in the first instance; and the court does not desire to take any action at this time which might foreclose the possibility of such review in the court of appeals."

See also *Abbott Laboratories, et al. v. Gardner*, U.S., 18 L.ed.2d 681, 696; *Cory Corporation, et al. v. Sauber*, 363 U.S. 709, 712 (1960); *Salem v. United States Lines Company*, 370 U.S. 31, 38 (1962); and *U.S. v. Republic Steel Corporation*, 372 U.S. 482, 493 (1960).

The resolution of the question regarding the unreasonableness of the Commission's exercise of the disputed refund power in the circumstances of this case is not of such urgency as to justify the extraordinary deviation from normal Federal Appellate processes requested by Peti-

tioners.⁶ Moreover, this litigation would not be terminated by review of such questions at the present time. A decision adverse to Respondents would only result in further proceedings before the Commission concerning the question of a flow-through by the pipeline purchasers of the refunds imposed upon Respondents. *Texas Eastern Transmission Corp. v. Federal Power Commission*, 357 F.2d 352 (5th Cir. 1966); *United Fuel Gas Co. v. Federal Power Commission*, 367 F.2d 34 (4th Cir. 1966). Therefore, it is apparent that a radical departure from traditional review procedures is unwarranted, particularly when this Court's disposition of the refund power question in Nos. 60 and 61 may render these additional issues moot.

⁶ Such deviation is not contemplated by the appellate procedures prescribed by Section 19 of the Natural Gas Act. Moreover, Rule 20 of this Court requires that a case must be of "impending public importance" to justify a by-passing of the decisional process in the court of appeals. Petitioners have not invoked Rule 20, nor have they furnished support for its invocation.

CONCLUSION

For these reasons, the petitions for writs of certiorari should be denied. In the event that the Court should grant the petitions filed by these same Petitioners in Nos. 60 and 61 and the companion petition in No. 62, the petitions in Nos. 80 and 97 should be held to abide the Court's final disposition in Nos. 60, 61 and 62.

Respectfully submitted,

WILLIAM K. TELL, JR.
WILLIAM R. SLYE
JAMES D. ANNETT

*Attorneys for
Texaco Inc.*

PHILLIP D. ENDOM
ROBERT E. MAY
FRANCIS H. CASKIN, JR.

*Attorneys for
Sun Oil Company*

HOMER E. McEWEN, JR.
J. P. GREVE

*Attorneys for
Sunray DX Oil Company*

RICHARD F. REMMERS
*Attorney for
Sohio Petroleum Company*

KIEL BOONE
WILMER D. MASTERSON
*Attorneys for
Edwin L. Cox*

MARTIN N. ERCK
FRANK S. TROIDL

*Attorneys for
Humble Oil & Refining Company*

THOMAS G. CROUCH
ROBERT W. HENDERSON
DONALD K. YOUNG

*Attorneys for
Lamar Hunt*

SHERMAN S. POLAND
*Attorney for
George H. Coates*

ROBERT V. SMITH
*Attorney for
Patchin-Wilmoth Industries, Inc.*

J. EVANS ATTWELL
W. H. DRUSHEL
*Attorneys for
Clark Fuel Producing Company*